(3)

Supreme Court, U.S.
FILED
SEP 23 2002
CLERK

No. 01-1652

IN THE

Supreme Court of the United States

SOUTH AUSTIN COALITION COMMUNITY COUNCIL, WALTER E. RYAN JR., THEODORE CHABRAJA, ANITA B. HULL, ROBERT RIFKIN, and PATRICK A. STEFFES,

Petitioners,

v.

SBC COMMUNICATIONS INC., and AMERITECH CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF

CLINTON A. KRISLOV
Counsel of Record
KENNETH T. GOLDSTEIN
KRISLOV & ASSOCIATES, LTD.
Attorneys for Petitioners
20 North Wacker Drive
Suite 1350
Chicago, IL 60606
(312) 606-0500

176382

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

6 pp

Plaintiffs file this supplemental brief pursuant to Rule 15 to call attention to three new cases not available at the time Petitioners' filed their Petition for Certiorari. Sup. Ct. R. 15; *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238 (1985) (duty to inform the Court of "any" developments that may affect the outcome of the case). These new decisions demonstrate the timeliness of the question presented (the validity of antitrust claims following the enactment of the 1996 Telecommunications Act) now enhanced by a split developed among the circuits.

The Seventh Circuit's holding in this case that the line-extension doctrine as applied in *Navajo Terminals Inc. v. United States*, 620 F.2d 594 (7th Cir. 1979) should be extended into the area of telecommunications exempting antitrust enforcement is in contradiction to the regulatory milieu of deregulation with accompanying antitrust enforcement and represents a split between the circuits worthy of the Supreme Court's attention.

The recent decisions discussed below highlight a conflict of decisions rendered by United States Court of Appeals from the Second, Seventh, and Eleventh Circuits. The recent decisions issued by the Second Circuit Court of Appeals in *Law Offices of Curtis v. Trinko, L.L.P. v. Bell Atlantic Corp.*, 294 F.3d 307 (2d Cir. 2002) (June 20, 2002) and the Eleventh Circuit Court of Appeals in *Covad Communications Co. v. Bell South Corp.*, 299 F.3d 1272 (11th Cir. 2002) (August 2, 2002) along with *Verizon New Jersey, Inc. v. Ntgrity TeleContent Services, Inc.*, 2002 U.S. Dist. LEXIS 14741 (D. N.J. Aug. 12, 2002) are in conflict with the Seventh Circuit's decision in this case contradicting Congress' intention to subject telecommunication carriers to the full array of antitrust enforcement, specifically merging "baby Bells" or incumbent local exchange carriers.

Both Courts in *Trinko* and *Covad* acknowledge Congress enacted telecommunications deregulation to spur competition while ensuring consumer protection by private enforcement of the antitrust laws. Thus, the telecommunications industry was dramatically changed by the introduction of deregulation to promote competition in local markets after enactment of the Telecommunications Act of 1996. *Trinko*, 294 F.3d at 311. Congress, in spurring competition, explicitly *did not* provided immunity from antitrust violation claims for conduct covered in the 1996 Act. *Covad*, 299 F.3d at *14. The Eleventh Circuit held "Congress specifically and directly stated that the two Acts [Telecommunications Act of 1996 and the Sherman Act] were intended to be used in tandem to accomplish the congressional goals served by both acts — namely the stimulation of competition." *Covad*, 299 F.3d at *14.

The conflict between the Seventh Circuit's decision in this case and the decisions from the Second and Eleventh Circuit is whether incumbent local exchange carriers [ILECs] (SBC and Ameritech in this case) are "subject to antitrust enforcement." *See Covad*, 299 F.3d at *14. The Eleventh Circuit in *Covad* quoted the legislative record regarding the enactment of the Telecommunications Act:

> Antitrust law is synonymous with low prices and consumer protection — and that is exactly what we need in our telecommunications industry . . . *The bill contains an all-important antitrust savings clause which ensures that any and all telecommunications merger and anticompetitive activities are fully subject to the antitrust laws* . . . And by maintaining the role of the antitrust laws, the bill helps to ensure that the Bells cannot use their market power to impede competition and harm consumers.

Covad, 299 F.3d at * 17 -18; 142 Cong. Rec. H1145-06 (daily ed. Feb. 1, 1996 (statement of Rep. Conyers) (emphasis

added). The Eleventh Circuit concluded that "both the legislative and executive branches recognized that the antitrust laws would coexist alongside the [Telecommunications] Act." *Covad*, 299 F.3d at * 19.

The *Covad* case held that Plaintiff had stated claims under the antitrust laws. *Covad*, 299 F. 3d at *10, 13 & 14. Similarly, in *Trinko* the allegations of the complaint "may support an antitrust claim under a number of theories." *Trinko*, 294 F.3d at 326.

Trinko's holding is in even sharper conflict with the Seventh Circuit's decision. *Trinko* held:

> The savings clause unambiguously establishes that there is no 'plain repugnancy' between the Telecommunications Act and the antitrust statues. We thus find that the Telecommunications Act does not provide an 'implied immunity' from the antitrust laws. . . . [in a case] which involves an individual consumer seeking damages, the antitrust laws serve an important role. One of the purposes of the Clayton Act is 'to compensate victims of antitrust violations for their injuries.'

Trinko, 294 F.3d at 327-28; *citing*, *Illinois Brick Co. v. Illinois* 431 U.S. 720, 746 (1977).

Again the conflict among circuits is highlighted by *Trinko's* conclusion that, "While ideally, the regulatory process alone would be enough to bring competition to the local phone service markets, it is possible that the antitrust laws will be needed to supplement the regulatory scheme, especially with respect to injury caused to consumers." *Trinko*, 294 F.3d at 329.

Therefore, the exemption or loophole in antitrust enforcement created and expanded by the Seventh Circuit in this case is now not just an issue of utmost public importance because it contradicts Congress' antitrust enforcement intentions associated with deregulation, but also represents a conflict in decisions between circuits which would be well served by the Supreme Court's attention.

Respectfully submitted,

CLINTON A. KRISLOV
Counsel of Record
KENNETH T. GOLDSTEIN
KRISLOV & ASSOCIATES, LTD.
Attorneys for Petitioners
20 North Wacker Drive
Suite 1350
Chicago, IL 60606
(312) 606-0500